

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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LESTER L. TELLIS,

Case No. 3:10-cv-00387-MMD-VPC

Petitioner,

ORDER

v.

BILL DONAT, et al.,

Respondents.

This counseled, second-amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 brought by a Nevada state prisoner is now before the Court for final disposition on the merits. (Dkt. no. 39.) Respondents have answered (dkt. no. 40), and petitioner replied (dkt. no. 43).

**I. PROCEDURAL HISTORY AND BACKGROUND**

On January 18, 2008, Lester Tellis (“Tellis” or “petitioner”), who was in the custody of the Nevada Department of Corrections (“NDOC”) at Nevada State Prison (“NSP”), received a Notice of Charges (“NOC”) alleging the following violations: MJ19 - Sexual Assault; MJ25 — Threats; and MJ30 — sexually stimulating activities. (Exh. 2 at 2-3.)<sup>1</sup> Prison officials served the NOC on petitioner on January 22, 2008. (*Id.* at 3.) Prison personnel conducted a disciplinary hearing on January 28, 2008, and found Tellis guilty. (*Id.* at 6-9.)

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<sup>1</sup>Exhibits 1-34 are exhibits to petitioner’s first-amended petition, dkt. no. 15, and are found at dkt. nos. 16-17.

1 Tellis filed a grievance challenging the findings of the disciplinary hearing. (Exh.  
2 4.) Ultimately, NSP officials conducted a new disciplinary hearing on or about March 7,  
3 2008. (Exh.6 at 2.) Tellis was again found guilty. (*Id.* at 9.) His sanctions included 24  
4 months disciplinary segregation, 60 days loss of appliances, 60 days loss of canteen  
5 privileges, and a loss of 450 days of statutory credits. (Exhs. 2, 5.)

6 Tellis filed a state habeas petition on September 5, 2008. (Exh. 13.) The state  
7 district court dismissed the petition, finding that Tellis failed to provide proof that he lost  
8 good-time credits as a result of the second disciplinary hearing. (Exh. 23.) On  
9 December 12, 2009, the Nevada Supreme Court affirmed the dismissal of the petition  
10 and later denied rehearing. (Exhs. 26, 28, 29.)

11 The Clerk received Tellis' federal habeas petition on June 25, 2010. (Dkt. no. 4.)  
12 This Court appointed counsel. (Dkt. no. 7.) Now before the Court is respondents'  
13 answer to the counseled, second-amended petition (Dkt. no. 40.)

## 14 **II. FEDERAL HABEAS CORPUS STANDARDS**

15 28 U.S.C. § 2254(d), a provision of the Antiterrorism and Effective Death Penalty  
16 Act (AEDPA), provides:

17 An application for a writ of habeas corpus on behalf of a person in  
18 custody pursuant to the judgment of a State court shall not be granted with  
19 respect to any claim that was adjudicated on the merits in State court  
proceedings unless the adjudication of the claim —

20 (1) resulted in a decision that was contrary to, or involved an  
21 unreasonable application of, clearly established Federal law, as  
determined by the Supreme Court of the United States; or

22 (2) resulted in a decision that was based on an unreasonable  
23 determination of the facts in light of the evidence presented in the State  
court proceeding.

24 The AEDPA limits this Court's ability to grant a writ to cases where "there is no  
25 possibility fair-minded jurists could disagree that the state court's decision conflicts with  
26 [Supreme Court] precedents." *Harrington v. Richter*, 562 U.S. 86, 100 (2011).

27 However, here, the state district court as well as the Nevada Supreme Court  
28 failed to address the merits of Tellis' due process claim (see dkt. nos. 40, 43; Exhs. 23,

26, 28). Thus, Tellis' claim is not subject to the deferential AEDPA standard and will be reviewed *de novo*. See *Rompilla v. Beard*, 545 U.S. 374, 390 (2005); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

### III. DUE PROCESS STANDARDS FOR REVOKING GOOD-TIME CREDITS

Prisoners have a protected liberty interest in good time credits received pursuant to NRS 209.4465. See *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974). Due process procedures protect against the arbitrary revocation of these good time credits. *Id.* In *Superintendent v. Hill*, 472 U.S. 445, 454 (1985), the Supreme Court explained:

Where a prison disciplinary hearing may result in the loss of good time credits, *Wolff* held that the inmate must receive: (1) advance written notice of the disciplinary charges; (2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and present documentary evidence in his defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action.

418 U.S. at 563-567. The Supreme Court articulated the unique contribution of *Superintendent*:

Although *Wolff* did not require either judicial review or a specified quantum of evidence to support the factfinder's decision, the Court did note that "the provision for a written record helps to assure that administrators, faced with possible scrutiny by state officials and the public and perhaps even the courts, where fundamental human rights may have been abridged, will act fairly." *Wolff*, 418 U.S. at 565. We now hold that revocation of good time does not comport with "the minimum requirements of procedural due process," *id.* at 558, unless the findings of the prison disciplinary board are supported by some evidence in the record.

*Superintendent*, 472 U.S. at 454 (emphasis added). The Supreme Court went on to classify the evidence in *Superintendent* as "meager" and as only circumstantial, but because there was "some" evidence it was still enough to find that the disciplinary board's decision had some support and was not "otherwise arbitrary." *Id.* at 457.

### IV. INSTANT PETITION

#### A. Petitioner's Claim

Petitioner asserts a single ground for relief — NDOC personnel violated his Sixth and Fourteenth Amendment due process rights when they refused to allow him to present witnesses and other evidence at his disciplinary hearing. (Dkt. no. 39 at 5-7.) As

1 a result of the hearing, Tellis was sanctioned with the loss of good-time credits. (*Id.* at  
2 5.)

3 Tellis alleges the following. On January 18, 2008, he was housed at Nevada  
4 State Prison ("NSP"), and a caseworker received an anonymous kite under her office  
5 door. (Exh. 2.) The kite accused Tellis of having sexual intercourse with another inmate  
6 in the shower the day before and also accused him of having sexual intercourse in the  
7 "room" while the window was covered up. (*Id.*)

8 Associate Warden Watson, the investigating officer, found that Tellis had forced  
9 another inmate to have sexual intercourse several times over the past ten months by  
10 offering to protect him from other inmates. (*Id.*) At a disciplinary hearing on January 28,  
11 2008, the hearing officer concluded that the allegations were supported by Warden  
12 Watson's investigation and found Tellis guilty. (*Id.*) He was sanctioned with 18 months  
13 of disciplinary segregation, ordered to pay restitution, and recommended for loss of  
14 good-time credits. (Exhs. 2, 5.)

15 Tellis filed a grievance regarding his hearing and was afforded a new hearing,  
16 which took place on March 27, 2008. (Exhs. 4, 6.) Tellis claims that he was not allowed  
17 to call witnesses or introduce other documentary evidence at his second disciplinary  
18 hearing in violation of his due process rights. (Dkt. no. 39 at 5-7).

19 In his reply in support of his petition, Tellis recounts the second disciplinary  
20 hearing from the audio recording that respondents provided for this action. (Dkt. no. 43  
21 at 8-11; see *a/so* dkt. no. 24.) Tellis notes that most of his own brief statements during  
22 the hearing are inaudible. (Dkt. no. 43 at 8.) Tellis was permitted substitute counsel,  
23 inmate Nathaniel Meeks ("Meeks"). He met with Meeks on March 11, 2008, and asked  
24 Meeks to obtain written statements from four inmates. Meeks was also present at the  
25 disciplinary hearing.

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1           Officer Adolf Stankus ("Stankus") conducted the hearing. He read the Notice of  
2 Charges:

3           On January 18, 2008, CCS 1, Anita Habberfield approached AWO Watson  
4 with an anonymous kite that was placed under her office door. The Kite  
5 stated that Tellis, identified later as Lester Tellis 24522 aka Diamond was  
6 in D wing taking a shower with the faggot, Shawn Jacobson 92726, on the  
7 previous day. The kite went on to allude that Tellis was having sexual  
8 intercourse with Jacobson. The kite said that they had also had sex in the  
9 room with the door window covered. AWO Watson investigated the claim  
10 made by the kite and it was determined that Tellis had forced Shawn  
11 Jacobson to have sexual intercourse with him approximately 5 or 6 times  
over the course of the previous 10 months. Intercourse was sexual  
assault. Tellis approached Jacobson under the auspice of providing him  
with protection for having sex with him. Jacobson thought he had no  
choice but to comply or be raped by another inmate. Both inmates were  
sent to medical and placed in administrative segregation. Medical  
conducted blood tests to ascertain if communicable diseases were present  
in either inmate. Further information was provided *in camera* to the  
hearing officer.

12 (*Id.*)

13           Tellis pled not guilty and made a brief statement. The officer stated for the record  
14 that Tellis asked Meeks to get statements from four inmates: Minor, Tribble, Bowyer,  
15 and Calvin Tellis (apparently petitioner's brother).

16           Bowyer provided a written statement:

17           I have never observed any activity between the two people mentioned  
18 above. As far as I know, Shawn had no problems with Lester Tellis and  
19 was always happy to see him. Shawn Jacobson did a lot of cell visiting but  
I didn't permit any activities of his in my room. As far as the shower rumor,  
that is what it is, a rumor.

20 (*Id.* at 9.) Stankus advised Tellis that the other three witnesses had refused to provide  
21 statements. Stankus also stated that he personally spoke to Calvin Tellis who stated  
22 "Lester (petitioner) didn't do that" but had no further information regarding the  
23 allegations. (*Id.*)

24           Stankus acknowledged that Tellis had requested staff witnesses. Stankus  
25 summarized their statements:

26           Corrections Officer ("CO") Thompson stated that he was not  
27 working on that day (January 17, 2008) and this was verified through the  
28 shift roster. CO Thompson further stated that he attempted to keep the  
wing crossing down but that it is not possible to stop it all.

1 CO Indiveri, who was working that day, stated that he did not permit  
2 wing crossing on his shift but that it is not possible to stop it all. He opined  
that he caught about 99% of the wing crossing.

3 Stankus' summary of what CO Mattice stated cannot be heard  
4 completely due to the quality of the tape.

5 Coach Love stated that Tellis returned a chess set to him that day  
6 but did not recall whether it was in the morning or the afternoon and he  
could not verify how long Tellis was in the gym.

7 *Id.* at 9-10.

8 Stankus did not describe the *in camera* information he reviewed nor identify any  
9 other witnesses. Stankus stated that he based his decision on the fact that Tellis'  
10 witnesses were not able to support his claims as to what went on that day. Stankus  
11 stated that according to "reports" the acts had gone on for about ten months. (*Id.* at 10.)

12 Stankus found Tellis guilty of all of the charges and imposed 24 months  
13 segregation, 60 days loss of phone and canteen privileges, 60 days loss of property and  
14 loss of good time credits in Category A. (*Id.*) Tellis appealed the hearing officer's  
15 decision. (Exh. 8.) While the decision was upheld and prison officials set the loss of  
16 good-time credits at 450 days, the segregation sanction was reduced to the original 18  
17 months that had been imposed at the first disciplinary hearing. (*Id.*)

18 This Court concludes that Tellis' claims that he was denied the opportunity to call  
19 witnesses and present other evidence is clearly belied by the record, as set forth above.  
20 The hearing officer specifically presented for the record the written statement of one  
21 inmate witness and also stated that he had personally spoken with Tellis' brother.  
22 Stankus further noted that three inmates from whom Tellis sought written statements —  
23 including Tellis' brother — refused to provide them. With respect to staff witnesses, the  
24 hearing officer recounted the statements of four of the staff witnesses that Tellis  
25 requested. Notably, inmates' due process rights in disciplinary hearings do not extend to  
26 confrontation or cross-examination of witnesses. *Wolff*, 418 U.S. at 567-568.

27 Finally, the only specific documentary evidence Tellis refers to in either his  
28 petition or reply is the results of alleged blood tests. (Dkt. no. 4 at 15.) However, Tellis

1 stated during the hearing that: "The whole notice of charges is wrong. It said they took  
2 us to the infirmary which never happened so that is a lie." (*Id.* at 9.) Thus, Tellis appears  
3 to know that no blood tests took place and, therefore, no results exist. Tellis does not  
4 identify any other documentary evidence that he was not allowed to introduce.

5 This Court determines that Tellis has failed to demonstrate that he was not  
6 permitted to call witnesses or introduce specific documentary evidence in his  
7 disciplinary proceedings in violation of his due process rights. Accordingly, his petition  
8 will be denied.

#### 9 **V. CERTIFICATE OF APPEALABILITY**

10 In order to proceed with an appeal, petitioner must receive a certificate of  
11 appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v.*  
12 *Ornoski*, 435 F.3d 946, 950-51 (9th Cir. 2006); see also *United States v. Mikels*, 236  
13 F.3d 550, 551-52 (9th Cir. 2001). Generally, a petitioner must make "a substantial  
14 showing of the denial of a constitutional right" to warrant a certificate of appealability.  
15 *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). "The  
16 petitioner must demonstrate that reasonable jurists would find the district court's  
17 assessment of the constitutional claims debatable or wrong." *Id.* (quoting *Slack*, 529  
18 U.S. at 484). In order to meet this threshold inquiry, the petitioner has the burden of  
19 demonstrating that the issues are debatable among jurists of reason; that a court could  
20 resolve the issues differently; or that the questions are adequate to deserve  
21 encouragement to proceed further. *Id.* This Court has considered the issues raised by  
22 petitioner, with respect to whether they satisfy the standard for issuance of a certificate  
23 of appealability, and determines that none meet that standard. The Court will therefore  
24 deny petitioner a certificate of appealability.

#### 25 **VI. CONCLUSION**


26 It is therefore ordered that the second-amended petition for a writ of habeas  
27 corpus (dkt. no. 39) is denied in its entirety.

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1 It is further ordered that the Clerk shall enter judgment accordingly and close this  
2 case.

3 It is further ordered that petitioner is denied a certificate of appealability.

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5 DATED THIS 29<sup>th</sup> day of September 2015.

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8 MIRANDA M. DU  
9 UNITED STATES DISTRICT JUDGE  
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